No. 09-989

In the Supreme Court of the United States

DWIGHT J. LOVING, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

NEAL KUMAR KATYAL
Acting Solicitor General
Counsel of Record

LANNY A. BREUER
Assistant Attorney General

THOMAS E. BOOTH
Attorney

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

In 1994, on direct appeal, the Court of Appeals for the Armed Forces denied petitioner relief on his claim that he received constitutionally ineffective assistance of counsel. In 2006, the court of appeals agreed to entertain a petition for extraordinary relief to revisit that decision. Following an extensive evidentiary hearing, the court of appeals denied relief on the ground that petitioner had not shown prejudice. The question presented is:

Whether the court of appeals' handling of petitioner's post-conviction petitions for extraordinary relief violated constitutional standards applicable to the speedy handling of appeals and required the court of appeals to presume prejudice on petitioner's underlying claim of ineffective assistance.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	12
Conclusion	25

TABLE OF AUTHORITIES

Cases:

Barker v. *Wingo*, 407 U.S. 514 (1972)	24
Burkett v. *Cunningham*, 826 F.2d 1208 (3d Cir. 1987)	19
Cody v. *Henderson*, 936 F.2d 715 (2d Cir. 1991)	19, 24
Coe v. *Thurman*, 922 F.2d 528 (9th Cir. 1990)	20
Doggett v. *United States*, 505 U.S. 647 (1992)	22
Harris v. *Champion*, 15 F.3d 1538 (10th Cir. 1994)	20
Herrera v. *Collins*, 506 U.S. 390 (1993)	19
Massaro v. *United States*, 538 U.S. 500 (2003)	6
Middendorf v. *Henry*, 425 U.S. 25 (1976)	18
Montejo v. *Louisiana*, 129 S. Ct. 2079 (2009)	16
Pennsylvania v. *Finley*, 481 U.S. 551 (1987)	17
Rheuark v. *Shaw*, 628 F.2d 297 (5th Cir. 1980), cert. denied, 450 U.S. 931 (1981)	19
Schriro v. *Landrigan*, 550 U.S. 465 (2007)	18
Sears v. *Upton*, No. 09-8854 (June 29, 2010)	24
Simmons v. *Beyer*, 44 F.3d 1160 (3d Cir.), cert. denied, 516 U.S. 905 (1995)	20
Simmons v. *Reynolds*, 898 F.2d 865 (2d Cir. 1990)	19
Strickland v. *Washington*, 466 U.S. 668 (1984)	7, 19, 24

Cases—Continued: Page

United States v. *DeLeon*, 444 F.3d 41 (1st Cir. 2006) 19, 21
United States v. *Denedo*, 129 S. Ct. 2213 (2009) ... 6, 12, 14
United States v. *DuBay*, 37 C.M.R. 411 (C.M.A. 1967) ... 6
United States v. *Ginn*, 47 M.J. 236 (C.A.A.F. 1997) 6
United States v. *Hawkins*, 78 F.3d 348 (8th Cir.), cert. denied, 519 U.S. 844 (1996) 19
United States v. *Johnson*, 732 F.2d 379 (4th Cir.), cert. denied, 469 U.S. 1033 (1984) 21
United States v. *Loud Hawk*, 474 U.S. 302 (1986) 22, 23
United States v. *Moreno*, 63 M.J. 129 (C.A.A.F. 2006) ... 22
United States v. *Sanders*, 452 F.3d 572 (6th Cir. 2006), cert. denied, 550 U.S. 920 (2007) 21
Vermont v. *Brillon*, 129 S. Ct. 1283 (2009) 22
Weiss v. *United States*, 510 U.S. 163 (1994) 18
Wiggins v. *Smith*, 539 U.S. 510 (2003) 8, 24
Williams v. *Taylor*, 529 U.S. 362 (2000) 17, 24
Wills v. *Texas*, 511 U.S. 1097 (1994) 15

Constitution, statutes and rules:

U.S. Const.:
Art. III 12
Amend. V (Due Process Clause) 18
Amend. VI 23
All Writs Act, 28 U.S.C. 1651(a) 7
Uniform Code of Military Justice, 10 U.S.C. 801 *et seq.*:
Art. 66(b)(1), 10 U.S.C. 866(b)(1) 5

Statutes and rules—Continued: Page

Art. 66(c), 10 U.S.C. 866(c) 6
Art. 67(a)(1), 10 U.S.C. 867(a)(1) 5, 16
Art. 67(a)(1)-(3), 10 U.S.C. 867(a)(1)-(3) 13
Art. 67(c), 10 U.S.C. 867(c) 6
Art. 67a, 10 U.S.C. 867a 14
Art. 71(a), 10 U.S.C. 871(a) 7
Art. 80, 10 U.S.C. 880 (1988) 2, 4
Art. 118, 10 U.S.C. 918 (1988) 4
Art. 118(1), 10 U.S.C. 918(1) (1988) 2
Art. 118(4), 10 U.S.C. 918(4) (1988) 2
Art. 122, 10 U.S.C. 922 (1988) 2, 4
28 U.S.C. 1259 ..... 13, 14
28 U.S.C. 1259(1)-(3) 13
28 U.S.C. 1259(4) 13, 14
Courts-Martial R. (1995):
Rule 1004(c)(7)(B) 5
Rule 1004(c)(7)(D) 5
Rule 1004(c)(8) 5
Sup. Ct. R. 10 15

Miscellaneous:

H.R. Rep. No. 549, 98th Cong., 1st Sess. (1983) 14

In the Supreme Court of the United States

No. 09-989

DWIGHT J. LOVING, PETITIONER

v.

UNITED STATES OF AMERICA

(CAPITAL CASE)

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ARMED FORCES

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-78a) is reported at 68 M.J. 1. Previous decisions and orders of that court are reported at 64 M.J. 132, 62 M.J. 235, 54 M.J. 459, 49 M.J. 387, 47 M.J. 438, 42 M.J. 109, and 41 M.J. 213. The opinions of the Army Court of Military Review affirming petitioner's death sentence are reported at 34 M.J. 1065 and 34 M.J. 956. The opinion of this Court affirming petitioner's death sentence on direct review is reported at 517 U.S. 748.

JURISDICTION

The judgment of the court of appeals was entered on July 17, 2009. A petition for reconsideration was denied on September 1, 2009 (Pet. App. 106a-107a). On Novem-

ber 30, 2009, the Chief Justice extended the time within which to file a petition for a writ of certiorari to and including December 30, 2009. On December 23, 2009, the Chief Justice further extended the time to January 29, 2010, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(4), but as explained below, see pp. 13-14, *infra*, that provision does not confer jurisdiction to review the decision of the court of appeals denying petitioner relief.

STATEMENT

In 1989, following a general court-martial, petitioner was convicted of premeditated murder, felony murder, attempted murder, and robbery (four specifications), in violation of Articles 118(1) and (4), 80, and 122 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 918(1) and (4), 880, and 922 (1988). He was sentenced to death. Pet. App. 2a. The United States Army Court of Military Review (CMR) affirmed, 34 M.J. 956, and subsequently denied reconsideration, 34 M.J. 1065. (The Army CMR is now known as the Army Court of Criminal Appeals (CCA).) The United States Court of Appeals for the Armed Forces (CAAF) affirmed the conviction and death sentence, 41 M.J. 213, modified, 42 M.J. 109. This Court granted review of the sentence and affirmed, 517 U.S. 748.

Following multiple petitions for coram nobis and other post-conviction relief, all of which were denied by the military courts, petitioner filed the instant petition for a writ of habeas corpus directly in the CAAF. After ordering an evidentiary hearing, 64 M.J. 132, and receiving the findings of fact and conclusions of law from that hearing, Pet. App. 79a-105a, the CAAF denied the petition. *Id.* at 1a-48a.

1. Petitioner was an Army private stationed at Fort Hood, Texas. On December 11, 1988, petitioner robbed two convenience stores at gunpoint but obtained only small amounts of money. The next evening, petitioner decided to rob taxicab drivers in the hope of obtaining more money. Petitioner called a cab to take him from a grocery store to Fort Hood. The driver of the cab was Private Christopher Fay, a soldier working as a cab driver for extra money. Petitioner directed Fay to a secluded area of Fort Hood, demanded money at gunpoint, took Fay's money, and shot Fay twice in the back of the head, killing him. Petitioner walked back to his barracks, counted the money he had stolen from Fay, and called another cab minutes later. He directed the driver, retired Army Sergeant Bobby Sharbino, to a secluded street in Killeen, Texas, where he stole Sharbino's money pouch, wallet, and cigarette lighter. He then ordered Sharbino to lie down on a car seat and shot him in the head, killing him. See 517 U.S. at 751; 41 M.J. at 229.

Later that night petitioner took his girlfriend, Nadia Pessina, to a nightclub in Killeen. When they left, they got into a cab driven by Howard Harrison. After dropping off Pessina, petitioner directed Harrison to a secluded area and robbed him at gunpoint. Petitioner tried to kill Harrison, but he got away. Petitioner was arrested the next day. He made a videotaped confession and told the police that his gun and other items of incriminating evidence were at Pessina's house. Searches outside and (with Pessina's consent) inside the house recovered the murder weapon, Sharbino's cigarette lighter, and other evidence. 41 M.J. at 229-231.

2. The general court-martial found petitioner guilty of the felony murder of Fay, the premeditated murder

of Sharbino, the attempted murder of Harrison, and multiple counts of robbery, in violation of Articles 118, 80, and 122 of the UCMJ, 10 U.S.C. 918, 880, and 922 (1988).[1]

During the guilt phase of the court-martial proceeding, petitioner's three military defense counsel (Pet. App. 84a) referred to petitioner's troubled childhood and background in their arguments. During the sentencing phase, defense counsel presented the following witnesses in mitigation: Joe Loving, Sr., petitioner's father; Lucille Williams, his mother; Ronald Loving, his brother; Wendolyn Black, his sister; Lord Johnson, his boxing coach; and Detective Verna of the Rochester, New York police department. Petitioner also presented the stipulated testimony of Harryl Loving, his brother, and Kenneth Wilson, his childhood teacher. Finally, petitioner introduced his school records and the arrest records of his father and a childhood friend into evidence. *Id.* at 25a-26a.

The mitigation evidence showed that petitioner had a troubled childhood and upbringing. See Pet. App. 22a-23a. Specifically, petitioner was the youngest of eight children. Petitioner's father drank heavily, had a long police record, was physically abusive, did not know petitioner's age or birthday, and ceded all childrearing to petitioner's mother. Petitioner's mother worked nights to support the family, but illness ultimately forced her to quit work. Petitioner was a poor student, a frequent truant, and a disciplinary problem. Petitioner's boxing coach described him as a "follower." In sum, petitioner "grew up in an economically depressed, violent, drug-

---

[1] The military judge dismissed some counts as multiplicitous. 41 M.J. at 231-232.

infested neighborhood with substandard schools." 41 M.J. at 249.

In closing argument, petitioner's defense counsel argued against the death penalty in part because of petitioner's troubled childhood. Pet. App. 31a-33a. The military judge instructed the court members on 19 mitigating factors, including six that directly related to petitioner's troubled childhood, including that he grew up in a low-income urban area; that he was raised by a single parent with seven other siblings; his father's effect on him; his inadequate schooling; his exposure to violence as a youth; and that he was a "follower." *Id.* at 22a-24a, 32a.

The court-martial unanimously found, as aggravating factors, that the premeditated murder of Sharbino was committed while petitioner was engaged in a robbery; that petitioner, having been found guilty of the premeditated murder of Sharbino, was found guilty of another murder in the same case; and that, in the felony murder of Fay, petitioner had acted as the triggerman. 517 U.S. at 751; see Rules for Courts-Martial 1004(c)(7)(B), (7)(J) and (8) (1995). The court-martial also concluded unanimously that those aggravating factors "substantially outweighed" any mitigating factors. 41 M.J. at 302.

3. The UCMJ requires that court-martial convictions resulting in a death sentence be reviewed by the court of criminal appeals for the appropriate armed service and, if that court affirms, by the CAAF. 10 U.S.C. 866(b)(1), 867(a)(1). The Army CMR affirmed petitioner's conviction. 34 M.J. 956, reconsideration denied, 34 M.J. 1065.

In his briefs to the CAAF, petitioner raised 70 claims of error, including a claim that his defense counsel had rendered ineffective assistance by failing to call a miti-

gation expert and to present mitigating evidence relating to his troubled background.[2] Petitioner supported his argument with, among other things, affidavits from his mother, Lucille Williams; his sisters, Gwendolyn and Wendolyn Black; and his brothers, Ronald and Harryl Loving. Pet. 1993 CAAF Br. 85-129; Pet. CAAF App. Exhs. AA-EE.[3] Except for Gwendolyn Black, all of those individuals had presented testimony in person or by stipulation at petitioner's trial. In his brief on appeal, petitioner did not request an evidentiary hearing on his ineffective-assistance claim.

The CAAF affirmed. 41 M.J. 213. The CAAF rejected petitioner's ineffective-assistance claim, holding first that defense counsel acted reasonably in not calling a mitigation expert, and second, that "defense counsel investigated [petitioner's] background and competently presented his evidence during the sentencing phase of the trial." *Id.* at 250.

---

[2] Petitioner had raised an unrelated ineffective-assistance claim in the Army CMR. *See* 34 M.J. at 1067-1068.

[3] In the military, a defendant may (but is not required to) raise an ineffective assistance claim on direct appeal; the practice is not disfavored as in federal courts, *see Massaro* v. *United States*, 538 U.S. 500 (2003). The service Courts of Criminal Appeals have fact-finding power under 10 U.S.C. 866(c), but the CAAF has no fact-finding power. 10 U.S.C. 867(c). When a defendant raises an ineffective assistance claim in the CCA and includes supporting affidavits, the CCA can decide the issue if the facts are not reasonably disputed. If the facts are disputed, the CCA must order an evidentiary hearing before a military judge under *United States* v. *DuBay*, 37 C.M.R. 411 (C.M.A. 1967), to establish the facts before the CCA can decide the ineffective assistance issue. *See United States* v. *Denedo*, 129 S. Ct. 2213, 2229 (2009) (Roberts, C.J., concurring in part and dissenting in part) (describing *DuBay* procedure); *United States* v. *Ginn*, 47 M.J. 236, 248 (C.A.A.F. 1997).

This Court granted certiorari to consider whether the President was empowered to prescribe aggravating factors in capital cases prosecuted under the UCMJ. The Court affirmed the judgment of the CAAF. 517 U.S. at 751-752, 773-774.

4. "If the sentence of [a] court-martial extends to death, that part of the sentence providing for death may not be executed until approved by the President." 10 U.S.C. 871(a). The President has not yet approved petitioner's sentence. Pending presidential review and approval, petitioner has filed a number of collateral attacks on his court-martial conviction and sentence.

In August 1996, petitioner filed a petition for extraordinary relief in the Army CCA, arguing that the triggerman aggravating factor had been constitutionally deficient. The Army CCA denied relief, and the CAAF affirmed. 47 M.J. 438, 440, 441, cert. denied, 525 U.S. 1040 (1998). Before seeking review in this Court, petitioner also filed an untimely petition for reconsideration directly with the CAAF, asking that court to revisit its original decision in the case in light of a later decision. The CAAF denied that petition. 49 M.J. 387.

In 2001, petitioner filed a motion with the CAAF seeking permission to file an untimely petition for reconsideration of the court's 1994 decision on the theory that the CAAF had misconstrued the prejudice prong of the test for ineffective assistance of counsel established by *Strickland* v. *Washington*, 466 U.S. 668 (1984). The CAAF granted the motion to file the petition out of time, but it denied the petition on the merits. 54 M.J. 459, cert. denied, 534 U.S. 949 (2001).

In 2003 and 2004, petitioner filed petitions for writs of coram nobis under the All Writs Act, 28 U.S.C. 1651(a), with the CAAF. The second petition contended

that the CAAF had erred in rejecting his ineffective-assistance claim and relied on this Court's decision in *Wiggins* v. *Smith*, 539 U.S. 510 (2003). Pet. App. 5a. Petitioner contended that, as in *Wiggins*, his defense counsel had failed to present important evidence of his troubled childhood, and he resubmitted the affidavits that he had submitted on direct appeal. The CAAF denied the writ on procedural grounds, but ruled that petitioner could raise his ineffective assistance claim by filing a petition for a writ of habeas corpus in the CAAF. 62 M.J. at 236. Although the government contended that the CAAF would lack jurisdiction over any such petition for an extraordinary writ because petitioner's conviction had become final, the CAAF concluded that petitioner's conviction would not become final until approved by the President, see *id.* at 239, 244, and that it therefore had jurisdiction to entertain a habeas petition under the All Writs Act, *id.* at 246.

In February 2006, petitioner filed with the CAAF a petition for a writ of habeas corpus that raised, among other things, the ineffective-assistance claim based on *Wiggins*. See Pet. for Extraordinary Relief 34-69. The court of appeals decided to exercise its "discretion[]" to order a *DuBay* hearing, see note 3, *supra*, to develop an evidentiary record on petitioner's claim. 64 M.J. 132, 146-147; see *id.* at 141-152. The CAAF directed the military judge conducting the *DuBay* hearing to, among other things, assess the reliability and credibility of petitioner's affidavits from his family members. *Id.* at 152-153.

5. Petitioner presented numerous witnesses and evidence at the *DuBay* hearing. Four of petitioner's family members testified about petitioner's background: his sisters Wendolyn and Gwendolyn Black, his brother

Harryl Loving, and his aunt Alline Anderson. Wendolyn Black and Harryl Loving had testified at the court-martial and submitted affidavits in the 1993 CAAF proceedings. Janet Vogelsang, a social worker, also testified at the *DuBay* hearing, and petitioner also introduced her written biopsychosocial assessment into evidence. Finally, petitioner presented records from the New York State Department of Social Services about services and visits provided to his family from 1967 to 1985, as well as some medical records related to petitioner's birth and pediatric care. Pet. App. 34a. Petitioner's mother did not testify because she had died since the direct appeal; Ronald Loving, who had testified and provided an affidavit on direct review, refused to appear or to testify. *Id.* at 34a-35a & n.10.

The military judge entered findings of fact and conclusions of law recommending that the CAAF deny habeas relief. Pet. App. 79a-105a. He found that petitioner's defense counsel had conducted an adequate investigation and had been generally aware of the factual information, later developed in detail at the *DuBay* hearing, about petitioner's childhood (although not "all of the specific details of violence in [petitioner's] family home and neighborhood"). *Id.* at 94a, 98a-99a, 104a. The military judge also concluded that petitioner was not prejudiced by the omitted troubled-childhood evidence. *Id.* at 104a-105a.

The military judge also made findings about witness credibility. Although he found the testimony of the family members at the *DuBay* hearing to be "generally credible and reliable," Pet. App. 99a, he concluded that several of the affidavits submitted to the CAAF during the direct appeal were not credible (and, indeed, in some instances did not even represent the views of the affi-

and). See *id.* at 100a-101a. The military judge also found the affidavits of petitioner's trial counsel, which had been submitted to the CAAF in 1993 in connection with petitioner's ineffective-assistance claim, to be credible and corroborated by trial counsel's testimony at the *DuBay* hearing. *Id.* at 101a.

6. The CAAF denied habeas relief. Pet. App. 1a-78a.

a. Even assuming (without deciding) that counsel's investigation of mitigating evidence was deficient, Pet. App. 16a, and reviewing *de novo* the military judge's conclusions as to prejudice, *id.* at 17a, the CAAF concluded that petitioner had failed to show that he had experienced any prejudice, as necessary under *Strickland* for relief on an ineffective-assistance claim. *Id.* at 17a-48a.

The CAAF noted that petitioner had presented substantial mitigating evidence at trial; the court members were instructed on 19 separate mitigating factors. Pet. App. 22a-24a ("This is not a case where the record of trial was devoid of mitigation evidence at sentencing."). In addition to mitigating evidence to show that petitioner had been under his girlfriend's sway at the time of the murders, *id.* at 24a, "[e]vidence of [petitioner's] family and social background was also prominent in the mitigation case." *Id.* at 24a-25a. Petitioner's impoverished and abusive childhood was addressed by numerous witnesses, including petitioner's parents, siblings, and others. *Id.* at 26a; see *id.* at 26a-33a (discussing the mitigating evidence presented at trial in detail). "The evidence adduced during the *DuBay* hearing," which included testimony by two witnesses who had testified at trial, "was largely cumulative of the type of information presented to the [court] members at trial." *Id.* at 45a.

"[T]he members were aware that [petitioner's] childhood environment and family life were scarred by alcoholism, drugs, family violence, neighborhood violence, school violence, and gang violence." *Id.* at 47a. Although some evidence was presented for the first time at the *DuBay* hearing, the court concluded that it either did not "differ[] in kind or degree" from the trial evidence, or was not "sufficiently compelling as to establish prejudice in this case." *Id.* at 46a.

The court also noted that the aggravating evidence in this case was "overwhelming." Pet. App. 46a. The court explained that petitioner had committed two separate murders, each time shooting the victim in the back of the head even after the victim handed over his money as petitioner demanded. Petitioner had also tried to kill a third victim, who survived only because he was able to wrest the gun from petitioner. *Id.* at 46a-47a. In light of the considerable evidence in aggravation, the court was "convinced beyond a reasonable doubt that [even] if the members had been able to place the additional evidence adduced during the habeas proceedings on the mitigating side of the scale," there was no "reasonable probability that at least one member [of the court-martial] would have struck a different balance." *Id.* at 48a.

b. Judge Effron joined the court's opinion but filed a separate concurrence to note his previously expressed view with respect to an unrelated issue. Pet. App. 49a.

c. Judge Stucky concurred in part and in the result. Pet. App. 49a-56a. He agreed that petitioner had failed to show prejudice, *id.* at 49a, and concluded that petitioner had also failed to establish that his counsel rendered deficient performance, *id.* at 53a-56a. Judge Stucky therefore would have denied relief under both prongs of the *Strickland* test.

d. Judge Ryan dissented and would have dismissed the habeas petition for lack of jurisdiction. Pet. App. 57a-78a. In her view, the CAAF had erred in its 2005 ruling that it could exercise jurisdiction under the All Writs Act.[4] She would have held that the All Writs Act "does not authorize [the CAAF] to entertain a collateral attack through a habeas corpus petition that is not part of the direct review authorized by statute." *Id.* at 67a-68a. She contrasted the relief sought by petitioner with coram nobis relief, which this Court had recently held that the CAAF may grant, see *United States* v. *Denedo*, 129 S. Ct. 2213 (2009): coram nobis relief corrects an error in a previous proceeding and is considered an "extension" of that proceeding, whereas a petition for habeas relief commences a new civil proceeding. Pet. App. 69a. Judge Ryan concluded that habeas corpus could be available to petitioner only in an Article III court. *Id.* at 70a-74a.

7. Following the denial of habeas relief, petitioner filed a petition for reconsideration in which, for the first time, he urged the CAAF to set aside his death sentence on the ground that the passage of time between his first presentation of his ineffective-assistance claim on direct appeal and his *DuBay* hearing amounted to a denial of the right to a speedy appeal and a deprivation of due process. The CAAF summarily denied the petition. Pet. App. 106a-107a.

ARGUMENT

Petitioner contends (Pet. 23-36) that the decision of the court of appeals to grant him a new evidentiary hearing on the ineffective-assistance claim it had previ-

[4] Judge Stucky also noted that he had "concerns similar to" Judge Ryan's. Pet. App. 49a.

ously rejected was so long in coming that it deprived him of due process and warrants habeas relief from his death sentence. This Court lacks jurisdiction to entertain that claim, because the statute governing certiorari review of the CAAF's judgments does not extend to a denial of an extraordinary writ. Even if this Court had jurisdiction, further review would not be warranted. Petitioner failed to preserve his speedy appeal claim in his merits briefing in the court of appeals, and that court's summary order denying his petition for reconsideration does not conflict with any decision of another court of appeals or any decision of this Court.

1. This Court lacks jurisdiction to review the decision below. Pursuant to 28 U.S.C. 1259, this Court has jurisdiction to review, by writ of certiorari, only four specified categories of "[d]ecisions of the [CAAF]." The only potentially relevant category is set out in 28 U.S.C. 1259(4), which confers jurisdiction to review "[c]ases * * * in which the [CAAF] granted relief."[b] See Pet. I & n.1. But the instant decision "denied" petitioner's habeas corpus petition on the merits; it did not grant petitioner any relief. Pet. App. 48a.

The CAAF's previous decision to order a *DuBay* evidentiary hearing on petitioner's ineffective-assistance claim, see 64 M.J. at 152-153, likely did grant partial "relief" to petitioner that would have permitted the *gov-*

---

[b] The other three categories consist of decisions by the CAAF reviewing a judgment by a service Court of Criminal Appeals affirming a death sentence; decisions in cases certified to the CAAF by a service Judge Advocate General; and decisions in cases in which the CAAF granted the accused's petition for review of a CCA decision. See 28 U.S.C. 1259(1)-(3); see also 10 U.S.C. 867(a)(1)-(3). None of those statutory provisions applies here: the CAAF was considering a habeas corpus petition filed directly in that court, not an appeal from a CCA.

cranent to seek review pursuant to Section 1259(4). See *United States* v. *Denedo*, 129 S. Ct. 2213, 2219-2220 (2009) (holding that a decision remanding to the Navy-Marine Corps CCA "granted relief" because it provided some "redress or benefit"). But the 2006 decision was not adverse to petitioner, no party sought review of it in any event, and the time for seeking review of that decision has long since passed. This Court's holding in *Denedo* that "relief" includes "partial relief," *id.* at 2220, thus is of no benefit to petitioner. And contrary to petitioner's reading, Section 1259(4) does not confer certiorari jurisdiction over every subsequent decision in any case in which the CAAF has previously ordered a *DuBay* hearing. Rather, Section 1259(4) is most sensibly read to confer jurisdiction to review "[d]ecisions" to "grant[] relief." And petitioner seeks review of a decision that denied relief.

Indeed, because petitioner did not preserve his due process claim in his principal briefs and the CAAF therefore did not address it in its opinion, petitioner is in reality seeking review of the CAAF's order denying his petition for reconsideration. Even if, once the CAAF grants some form of partial relief, Section 1259(4) could be read to confer jurisdiction over every subsequent decision on the merits, it is implausible to conclude that Section 1259(4) confers jurisdiction over every subsequent procedural order in that case. See H.R. Rep. No. 549, 98th Cong., 1st Sess. 16-17 (1983) (noting that out of concern for this Court's docket, Section 1259 was carefully drafted not to confer jurisdiction over a "substantial" number of new petitions); cf. 10 U.S.C. 867a (precluding certiorari review of an action by the CAAF "in refusing to grant a petition for review").

2. The questions presented would not warrant an exercise of this Court's jurisdiction in any event, because petitioner did not timely raise his due process or speedy appeal theories before the CAAF, either in his petition for extraordinary relief or in the supplemental briefing that the CAAF invited following the *DuBay* hearing. Instead, petitioner first raised those theories in his petition for reconsideration following the CAAF's denial of his habeas petition.[6] Petitioner's failure to preserve the issue is alone sufficient reason to deny further review. Cf. *Wills* v. *Texas*, 511 U.S. 1097, 1097 (1994) (O'Connor, J., concurring in denial of certiorari) ("It has been the traditional practice of this Court * * * to decline to review claims raised for the first time on rehearing in the court below. Following this practice here makes good sense because we do not have the benefit of a decision analyzing the application of [the constitutional rule] to the facts of petitioner's case.") (citation omitted). Because the CAAF denied reconsideration in a summary order, Pet. App. 106a-107a, that disposition does not conflict with any other appellate decision. See Sup. Ct. R. 10.

Plenary review would be particularly unsuitable here. As petitioner acknowledges (Pet. 27), precedent of the CAAF agrees with his submission that the Constitution protects a speedy appeal right; at most, the court here can be said to have rejected the claim for procedural reasons or on its facts. This case thus presents no

---

[6] Even then petitioner's theory was different: whereas petitioner now argues that the delay entitles him to a presumption of prejudice on his ineffective-assistance claim, see, *e.g.*, Pet. i, he did not make that argument in the CAAF. Instead, he argued that the delay was itself a violation of due process that required setting aside his death sentence. Pet. for Recons. 10, 20, 23.

occasion to consider the theoretical viability of constitutional speedy appeal claims. Nor should this Court now undertake the sort of fact-intensive recapitulation of each phase of the protracted proceedings of petitioner's case, and the reasons for the timing of each phase, that would be necessary to reconstruct and review the court of appeals' determination. Cf., *e.g.*, *Montejo* v. *Louisiana*, 129 S. Ct. 2079, 2092 (2009) (declining to resolve unclear factual issues for the first time on certiorari review).

3. Petitioner's claim lacks merit in any event. The CAAF in 1994 squarely rejected petitioner's ineffective-assistance claim; in the proceedings below, it agreed to reopen that decision and allow petitioner to challenge it at an extensive evidentiary hearing. After that hearing, the court concluded that petitioner had not met his burden of establishing prejudice, a conclusion that petitioner does not dispute in this Court. Instead, petitioner now contends that the CAAF took an unconstitutionally long time to hear his collateral challenge and that, as a result, he is entitled to relief even though no court — whether in 1994 or 2009 — has ever concluded that petitioner has met either prong of the *Strickland* standard. Petitioner's claim lacks any support in the decisions of this Court or any other court of appeals. Further review is not warranted.

a. Petitioner's contention depends on the notion that this Court should review his claim "as though the current action, although filed as an extraordinary writ, was part of [petitioner]'s mandatory appeal." Pet. 26. That premise is fundamentally flawed.

Pursuant to the CAAF's statutory obligation in capital cases, 10 U.S.C. 867(a)(1), petitioner received full and thorough consideration of his ineffective-assistance

claim on direct appeal in 1994. The CAAF rejected that claim on its merits. See 41 M.J. at 259. Seven years later, petitioner then sought and was granted leave to file an untimely petition for reconsideration of his direct appeal based on this Court's decision in *Williams* v. *Taylor*, 529 U.S. 362 (2000), which analyzed a claim of ineffective assistance based on failure to investigate mitigating evidence. The CAAF took the extraordinary step of permitting petitioner to file a reconsideration petition years after it was due, and it denied reconsideration on the merits. 54 M.J. at 459. Accordingly, the CAAF more than adequately protected any right that petitioner had to the speedy and complete consideration of his appeals as of right.

The instant proceeding, based on a petition for an extraordinary writ that petitioner filed in 2007, forms no part of the appellate process. "Postconviction relief is even further removed from the criminal trial than is discretionary direct review. It is not part of the criminal proceeding itself * * *. It is a collateral attack that normally occurs only after the defendant has failed to secure relief through direct review." *Pennsylvania* v. *Finley*, 481 U.S. 551, 556-557 (1987). And as petitioner notes (Pet. 25), claims that in the federal system would be reviewed in collateral proceedings, such as ineffective-assistance claims, are considered on direct review in the military courts. See note 3, *supra*. Any such claim that the CAAF examines on habeas therefore is necessarily one that could be (and here was) already examined on direct review. Petitioner cites no case establishing a due process right to speedy handling of a habeas petition—let alone one seeking re-examination of a claim already timely resolved on direct appeal.

Moreover, petitioner appears to contend that the Due Process Clause requires not only a prompt resolution of a claim seeking re-examination of a conviction on habeas review, but also an evidentiary hearing. See Pet. 25-27. That contention lacks merit. Evidentiary hearings in collateral proceedings have never been a matter of right. See, *e.g.*, *Schriro* v. *Landrigan*, 550 U.S. 465, 473-474 (2007). Rather, they have been left largely to the sound discretion of the tribunal, see *id.* at 473, and here the CAAF exercised its discretion, see 64 M.J. at 146-147, to grant petitioner such a hearing on collateral review.

Finally, as petitioner acknowledges (Pet. 23), due-process challenges to the military justice system are reviewed with "particular deference to the determination of Congress, made under its authority to regulate the land and naval forces." *Weiss* v. *United States*, 510 U.S. 163, 177 (1994) (quoting *Middendorf* v. *Henry*, 425 U.S. 25, 43 (1976)). Thus, for instance, in the military context, the Due Process Clause does not even require the appointment of counsel in all court-martial proceedings. See *Middendorf*, 425 U.S. at 44-48.[7] The CAAF's handling of petitioner's postconviction petition can hardly be said to violate that highly deferential standard.

b. Even if petitioner were correct that his argument should be analyzed under the rubric of speedy appeal cases, those cases offer him no support here. Although the courts of appeals have analyzed speedy appeal claims in different ways, petitioner cites no case treating the failure to provide a speedy appeal as a sufficient ground for setting aside a conviction or sentence.

---

[7] Petitioner has been represented by appointed counsel throughout the proceedings, both on direct review and on his numerous applications for extraordinary relief.

"A defendant who has been convicted of a crime no longer enjoys a presumption of innocence." *United States* v. *DeLeon*, 444 F.3d 41, 59 (1st Cir. 2006) (citing *Herrera* v. *Collins*, 506 U.S. 390, 399 (1993)). Delays in processing a defendant's appeal from such a conviction do not suggest any invalidity in the conviction itself. They certainly do not suggest that the defendant should be relieved of proving prejudice, an essential element of an attack on a conviction based on constitutionally ineffective assistance of counsel. See *Strickland* v. *Washington*, 466 U.S. 668, 692-693 (1984).

Petitioner's cases finding constitutional speedy appeal violations (Pet. 27 n.15), therefore, focus on remedying those violations by ensuring that the appeal is heard; once the appeal *is* heard and decided on the merits, as petitioner's ineffective-assistance claim has been, petitioner identifies no case holding that past delay itself actually entitles the defendant to release.[*] See, *e.g.*, *Cody* v. *Henderson*, 936 F.2d 715, 722-723 (2d Cir. 1991) (reversing grant of release based on speedy appeal deprivation); *United States* v. *Hawkins*, 78 F.3d 348, 351, 352 (8th Cir.) (speedy appeal claim failed because underlying appellate issues were meritless), cert. denied, 519 U.S. 844 (1996); see also *Simmons* v. *Reynolds*, 898 F.2d 865, 869 (2d Cir. 1990) (suggesting that once the appeal proceeds, a speedy appeal violation "is more appropriately remedied by a suit for damages"); *Rheuark* v.

---

[*] In *Burkett* v. *Cunningham*, 826 F.2d 1208 (3d Cir. 1987), the State conceded that "the only appropriate remedy" was dismissal when the federal courts found that the *trial* court had engaged in numerous forms of unconstitutional delay that also impeded the defendant from bringing an appeal. *Id.* at 1211.

Shaw, 628 F.2d 297 (5th Cir. 1980) (damages action), cert. denied, 450 U.S. 931 (1981).[9]

Petitioner identifies (Pet. 34-35) one case in which a 13-year delay in hearing a direct appeal, which left a jury-selection claim essentially unreviewable because of the intervening loss of pertinent transcripts, caused a federal court to presume that the underlying constitutional claim was meritorious and grant habeas relief. *Simmons* v. *Beyer*, 44 F.3d 1160, 1170-1171 (3d Cir.), cert. denied, 516 U.S. 905 (1995). This case is altogether different, not only because there was no delay in the resolution of petitioner's direct appeal, but also because during his appeal petitioner was actually able to present evidence that he now complains is unavailable for collateral proceedings (such as testimony from witnesses who have since died).

In this case, petitioner attacks not the delay in hearing his ineffective-assistance claim, but the delay in reconsidering it. That puts petitioner's claim far afield from one truly challenging a denial of a speedy appeal; petitioner's real quarrel is with the outcome of the CAAF's 1994 resolution of his ineffective-assistance claim, not with the timing of subsequent proceedings. See Pet. 32 (delay was caused by the CAAF's "inadequate review in 1994"). The CAAF was under no obligation to hold an evidentiary hearing to reconsider that 1994 decision; the fact that it did so does not trigger some new form of speedy adjudication analysis.

---

[9] Several of petitioner's cases do not deal with the constitutional issue at all, but rather with whether to excuse the statutory exhaustion requirement for federal habeas petitions due to delay in the state appellate courts. See, *e.g.*, *Coe* v. *Thurman*, 922 F.2d 528 (9th Cir. 1990); *Harris* v. *Champion*, 15 F.3d 1538 (10th Cir. 1994).

c. There is some disagreement in the courts of appeals concerning whether to review speedy appeal claims under petitioner's preferred standard (Pet. 28), which is borrowed from the speedy trial analysis of *Barker* v. *Wingo*, 407 U.S. 514 (1972). Compare, *e.g.*, *United States* v. *Sanders*, 452 F.3d 572, 578 (6th Cir. 2006), cert. denied, 550 U.S. 920 (2007), and *United States* v. *Johnson*, 732 F.2d 379, 381-382 (4th Cir.), cert. denied, 469 U.S. 1033 (1984), with *DeLeon*, 444 F.3d at 58-59, and *Cody*, 936 F.2d at 719. This case presents no occasion to take up that issue, because even under the standard petitioner prefers, petitioner cannot establish a violation. The four factors of the *Barker* speedy trial analysis are the length of the delay, the reason for the delay, whether the defendant timely asserted his right, and prejudice to the defendant. 407 U.S. at 530. Applying those factors yields no constitutional violation here.

Within approximately two years after petitioner's sentencing, his first appeal had been briefed, argued, and decided by the Army CMR; petitioner had added new assignments of error; and the Army CMR had denied relief on those new claims in a supplemental opinion. See 34 M.J. at 956; 34 M.J. at 1065, 1066; Pet. 5. His second appeal was briefed and argued in the CAAF within 18 months thereafter; the CAAF decided the case just over a year later. 41 M.J. at 213. Those time periods are neither unreasonable nor unusual in capital litigation; petitioner raised 70 issues on appeal to the CAAF, which caused the CAAF to write a 113-page opinion in affirming the judgment. Moreover, the military courts considered petitioner's ineffective-assistance claims, and the attendant factual submissions, on direct review.

Even if the period following direct review in the military courts should count in the analysis, the delays generally were attributable to petitioner and to the court system. For example, petitioner spent two years pursuing direct review in this Court on questions not related to his ineffective-assistance claim. After this Court disposed of those issues, lengthy periods ensued when petitioner either was pursuing no relief (between this Court's denial of a third certiorari petition in October 2001 and the filing of a petition for extraordinary relief in April 2003); was pursuing other theories of relief (proceedings for extraordinary relief on a sentencing issue between September 1996 and December 1998); or was pursuing the ineffective-assistance theory in a procedural posture (coram nobis) that the CAAF subsequently found was improper (between April 2003 and December 2005).[10]

Nor is there any basis for applying a presumption of prejudice based on the length of these time periods, or the total time. See Pet. 28-29. Even before trial, if the government acts with "reasonable diligence," there is no presumption of prejudice "however great the delay." *Doggett* v. *United States*, 505 U.S. 647, 656 (1992). And petitioner identifies no "negligence" on the government's part. See *id.* at 657; see also *United States* v. *Loud Hawk*, 474 U.S. 302, 316 (1986).[11]

---

[10] To the extent that petitioner argues that delay caused by his own attorneys is not chargeable to him, see Pet. 30 (citing *United States* v. *Moreno*, 63 M.J. 129, 138 (C.A.A.F. 2006)), this Court rejected that notion in *Vermont* v. *Brillon*, 129 S. Ct. 1283, 1293 (2009).

[11] Petitioner does not contend that the delay in adjudicating his ineffective-assistance claim has caused him undue anxiety or resulted in oppressive incarceration. Even if petitioner's death sentence were to

Finally, as petitioner admits (Pet. 33), he never complained to the military courts that they were not resolving his case with sufficient speed. Merely filing numerous requests for relief is not the same thing as asserting a constitutional right to prompt review. See, *e.g.*, *Loud Hawk*, 474 U.S. at 314-315. That factor, too, weighs against petitioner in the *Barker* analysis.

4. Petitioner does not present any question concerning whether he is entitled to relief under the Sixth Amendment if he is not entitled to some sort of presumption of prejudice based on the passage of time. Pet. i. That underlying constitutional claim is without merit in any event.

First, the CAAF found in 1994 that petitioner had not established that his attorneys performed deficiently, and the CAAF did not revisit that analysis in this case. Pet. App. 16a (assuming without deciding that petitioner could show deficient performance). Concurring Judge Stucky further explained why petitioner received constitutionally effective counsel at the penalty phase. *Id.* at 53a-56a. Petitioner's counsel conducted an appropriate investigation; in their search for mitigating evidence "[t]hey interviewed [petitioner] extensively, visited his hometown, spoke to family, friends, teachers, law enforcement officials, and the community center boxing coach." *Id.* at 55a-56a. Counsel's decision not to present some of the evidence they uncovered was a reasonable tactical judgment. *See id.* at 93a-94a, 95a-96a.

Second, petitioner cannot establish prejudice. The aggravating evidence in this case was "overwhelming." Pet. App. 46a. The court of appeals recognized and car-

---

be set aside on Sixth Amendment grounds, any retrial of the penalty phase would still result in at least a term of life imprisonment.

ried out its duty to reweigh the aggravating evidence against the totality of the available mitigating evidence, including the evidence that petitioner contends should have been adduced, to see whether there is a reasonable probability that the outcome would have been different had counsel acted differently. *See Wiggins* v. *Smith*, 539 U.S. 510, 534, 536 (2003); *Williams*, 529 U.S. at 397-398; *Strickland*, 466 U.S. at 695; accord *Sears* v. *Upton*, No. 09-8854 (June 29, 2010) (per curiam), slip op. 11. The court of appeals was "convinced beyond a reasonable doubt that if the members [of the court-martial] had been able to place the additional evidence adduced during the habeas proceedings on the mitigating side of the scale, [there was no] reasonable probability that at least one member would have struck a different balance." Pet. App. 48a.[7]

---

[7] Because the court of appeals correctly applied the standard for assessing prejudice, nothing in this Court's recent summary disposition in *Sears*, *supra*, casts doubt on its decision. The court of appeals contrasted the substantial mitigating evidence presented in petitioner's case with cases such as *Wiggins* and *Williams*, Pet. App. 42a-43a, but unlike the state court in *Sears*, the court of appeals did not suggest that the presentation of some mitigating evidence at trial pretermitted the inquiry into prejudice on postconviction review. *See Sears*, slip op. 10-11; Pet. App. 42a-48a. And in this case, unlike in *Sears*, no court has found that counsel's investigation of mitigating evidence was "facially deficient," *Sears*, slip op. 10.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

NEAL KUMAR KATYAL
Acting Solicitor General
LANNY A. BREUER
Assistant Attorney General
THOMAS E. BOOTH
Attorney

JULY 2010